EMPLOYMENT TRIBUNALS

Claimant: Mr G Liddle

Respondent: Jay Decorators Ltd

Heard at: Manchester **On:** 4 November 2019

Before: Employment Judge Howard

REPRESENTATION:

Claimant: In person
Respondent: M R Taylor, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unlawful deductions contrary to Part II of the Employment Rights Act 1996 and failure to make payments in respect of annual leave pursuant to regulation 30 of the Working Time Regulations 1998 succeed.

2. The respondent is ordered to pay to the claimant the sum of £10,030.26.

REASONS

1. I heard evidence from Mr Liddle and from a director of Jay Decorators Ltd, Mrs Yvonne Ogden. I was referred to documents contained within an agreed bundle together with additional documents which Mr Liddle submitted on the morning of the hearing, one of which was a draft witness statement of Mrs Ogden which it transpired had been served upon Mr Liddle in error and to which I attributed no weight; another was a bank account statement showing that Mr Liddle had not been employed by the respondent in 2012, which was agreed; and the other documents

were; a draft grounds of resistance, again sent in error to Mr Liddle upon which I place no weight; the grounds of resistance relied upon by the respondent and Mr Liddle's witness statement which had already been served.

2. At the outset of the hearing I revisited the issues to be determined with the parties, which had been laid out by Employment Judge Franey at a preliminary hearing on 22 August 2019:

(1) Was the claimant genuinely self-employed or was he a "worker" in that he worked under either a contract of employment or any other contract, whether express or implied and (if it is express) oral or in writing, whereby he undertook to do or perform personally any work or services for the respondent whose status was not, by virtue of that contract, a client or customer of any professional business undertaking carried on by the claimant?

(2) If so, did the respondent comply with its obligation to afford the claimant paid annual leave in accordance with the Working Time Regulations 1998?

(3) If not, in addition to a declaration that his claim is well-founded, should the Tribunal award the claimant any compensation given the respondent's argument that he has received holiday pay "rolled up" into his normal rate of pay over the relevant period?

(4) If any compensation is due, for what period can the claimant backdate his claim?

(a) Mr Liddle argues that the failure to provide paid holiday, at any time during his time with the respondent, amounted to a series of unlawful deductions beginning on 13th March 2015 and ending with the last payment of wages on 20 February 2019.

(b) Under the Employment Rights Act 1996 a claim for unlawful deduction from wages cannot be claimed for a period of more than two years before the date a claim was lodged, limiting Mr Liddle's claim to unpaid holiday from 1 June 2017 onwards. Under the Working Time Regulations 1998 annual leave is not generally carried over from one year to the next; potentially limiting Mr Liddle's claim further to payment for the final leave year.

(c) Mr Liddle relies upon the decision of the Court of Justice of the European Union in **King v Sash Windows C-214/16** to argue that these limits are not enforceable.

3. The respondent accepted at the outset of the hearing that Mr Liddle had provided his decorating services continuously from March 2015 to the termination of his relationship with the respondent on 19 January 2019, save for one occasion in 2016 when Mr Liddle did a few weeks' decorating work for someone else.

Findings of Fact relevant to the Issues

4. The respondent provides decorating services to commercial premises, they employ some decorators directly; approximately 5; and engage another 18 or so on what it considers to be a 'self-employed' subcontractor basis. Mr Liddle is a decorator and had worked for the respondent previously but between 2012 and 2015 was working elsewhere.

5. On 13 March 2015 the claimant started decorating work for the respondent. He worked continuously and exclusively for the respondent for the following 4 years, with the exceptions identified below, until the relationship came to an end in January 2019. Mr Liddle was paid a week in hand i.e. at the end of the following working week, at the rate of £10 an hour plus mileage at 17 pence per mile.

6. The respondent's Operations Director, John McKeough, would usually bid for work and agree a specification and timescale. He would then allocate sites to the decorators. Mr Liddle would be contacted and told where he should be the following day. As he explained, Mr McKeough would give him the drawings and tell him the specification and the timescale within which the job had to be done, and he would get on with it. He would usually work alongside another decorator sent by the respondent.

7. It was suggested to Mr Liddle that he could choose his own hours of work, however, as he explained, the reality of the situation was that to get the job done within the time allocated the decorators would work 12 hours daily unless there was a particular reason why that was not possible. Mr Liddle would text his hours worked to Mr McKeough on a Monday morning for the previous week and Mr McKeough would arrange payment to be made at the end of that week.

8. Mr Liddle used his own car to get to and from site, wore his own overalls and provided his own brushes and had a toolbox in which he kept scrapers and similar equipment. All other materials and equipment were provided by the respondent or the main contractor on site. The respondent would deliver paint, wallpaper, paste and dust sheets. The respondent would provide all necessary equipment in the form of dust sheets, tables, ladders, steps, cherry-pickers (raised platforms) and everything needed for the job. Sometimes ladders and steps would already be provided on site by the main contractor and Mr Liddle would use those. In any event he was not responsible for providing any equipment save for his own overalls, brushes and scrapers.

9. The respondent is a member of the Construction Industry Scheme and Mr Liddle opted to register with the scheme as a subcontractor. He paid his own National Insurance and benefitted from the scheme provision of income tax deduction at 20%.

10. Mr Liddle went on holiday for two weeks in the summers of 2016, 2017 and 2018. He explained that as he was not paid for holidays he would not take them unless he was going away as he could not afford it, and except for statutory holidays when he was not working, those were the only weeks in which he took holiday. He

explained that when he returned from holiday on each occasion, he had to work a week in hand again before he would be paid.

11. Mrs Ogden insisted that Mr Liddle was a self-employed contractor and so not entitled to paid holiday. She also pointed to a 'contract for assignment' which she claimed Mr Liddle had signed. At clause 10 of the contract it stated that holiday entitlement was rolled up into the hourly rate of pay. I was also shown an earlier contract that Mr Liddle agreed he had signed on 16 April 2007 with the respondent as a contract for self-employed subcontractors. Both parties agreed that this earlier contract was not effective and it was of no relevance to these proceedings, save that it evidenced Mr Liddle's handwriting.

12. The contract relied upon by Mrs Ogden as showing that Mr Liddle was a self-employed contractor and providing for a 'rolled-up' holiday pay arrangement, stated on its face that, *"This agreement dated January 12 is made between Jay Decorators Ltd and G Liddle".* At the end of the contract next to *"signed by the contractor"* is written *"G Liddle",* and it is undated. On a line below, *"signed on behalf of the company"* is Mrs Ogden's signature, next to it is entered a hand-written date of 27-2-2012.

13. As Mr Liddle pointed out, and the respondent accepted, he could not have signed the contract on 27-2-2012, nor could Mrs Ogden, as he was not working with them in 2012. Mr Liddle stated that the signature was not his and that he had never seen or signed this contract. Mrs Ogden's explanation in her witness statement was that:

"I also wish to confirm to the Tribunal that the date of 27 January 2012 as date signed is an admin error. I believe I may have transcribed the date looking at the cover page, which of course had come from our standard precedent."

14. In evidence to me, Mrs Ogden explained that 2 copies of the contract would have been sent out to Mr Liddle in March 2015 with a requirement that he sign and return one within a few weeks. When proceedings were issued by Mr Liddle in the Employment Tribunal, Mrs Ogden dug out his contract from the pile of similar contracts in the drawer in the office; she noticed that Mr Liddle had signed, but she had not, and so she signed and dated it herself. She was adamant that she had signed and dated the contract at the same time. Mrs Ogden's rationale for dating it 27 January 2012 was that she had glanced at the first page of the contract, had noted the reference to January 12 and had simply added on another couple of weeks on the assumption that Mr Liddle would have returned this contract by that time. This explanation was confused and not credible.

15. I pointed out to Mrs Ogden that her signature and the date had clearly been written with different pens, whereas the purported signature of Mr Liddle and the date were clearly written with the same pen. Moreover, the signature for Mr Liddle did not look like that written by Mr Liddle himself in April 2007. It was obvious to me from looking at it, that Mr Liddle's purported signature and the date had been written by the same hand and in the same pen; as Mrs Ogden had written the date, the obvious conclusion was that she had also entered Mr Liddle's name. Consequently,

I found that Mr Liddle had not signed the contract; he was not aware of its contents, had not agreed to it and was not bound by it to any extent.

16. Mrs Ogden accepted that no reference was made to holiday pay entitlement, rolled up or otherwise, in Mr Liddle's monthly pay statements issued or in any other documents sent to him. She agreed that she had never explained or discussed holiday pay entitlements with Mr Liddle and did not keep records of his leave entitlement. Mr Liddle's understanding was that he was not entitled to paid holidays and that is why he did not take much leave.

17. Mr Liddle explained that when he took leave, he did not have to seek permission, he would simply tell the office that he was going. He confirmed that he never received any payments for leave taken or for statutory holidays: he simply did not work on statutory holidays as the sites were closed.

18. Mr Liddle agreed with the suggestion put to him by Mr Taylor that he could turn down work allocated to him by the respondent. However, over the four years, with one exception, he never did. As he explained, he never refused work as he would not get paid. He did once in 2018 when he turned up to a site and it was in such a bad state that he rang Mr McKeough and said he couldn't do it; Mr McKeough simply sent him somewhere else for the following day.

19. Mr Liddle was adamant that he could not send someone in his place to do his work. He insisted that Mr McKeough would not have accepted anyone else doing it; the work was allocated to him personally to carry out. He explained that the job allocated would have, for example, a ten-day turnaround, and he would have to be there 12 hours a day to get it done within the specified timeframe. This meant he would normally start at 7.00am or when the main contractor opened the site and would often stay late and lock up.

20. It transpired that there was an occasion, in January 2019 when the respondent had no work for Mr Liddle to do, and he was not paid. Mr Liddle explained that the decorating trade is seasonal and there is very little subcontracting work after the Christmas break; he would not have been able to find alternative work for those two weeks and he did not attempt to do so. It was suggested to Mr Liddle that he had taken it as leave and/or he was carrying out work for someone else. Mr Liddle denied this; there was no evidence to support it and I found it to be mere speculation on the part of Mr Taylor.

The Law

21. S230(3) *'Worker'* means an individual who has entered into or works under (or where the employment has ceased, worked under) –

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract

> whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

22. The S230 definition of *'Worker'* is adopted for Working Time Regulations 1998.

Mutuality of Obligation

23. The minimum requirement for a contract for services is the existence of mutuality of obligation.

24. The Court of Appeal in **Secretary of State for Justice v. Windle and Arada [2016] EWCA Civ 459** stated that when determining the employment status of an individual it is '*necessary to consider all the circumstances'.*

25. As lord Justice Underhill pointed out in **Pimlico Plumbers Ltd and another (Appellants) v Smith (Respondent), [2018] UKSC 29**, the fact that in practice a person regularly works certain hours or undertakes certain assignments may shed light on the true categorisation of the relationship:

> *"If the position were that in practice putative employee/worker was regularly offered and regularly accepted work from the same employer so that he or she worked pretty well continuously that might weigh in favour of the conclusion that while working he or she had (at least) worker status."*

Subordination

26. The leading domestic authority on worker status is now **Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730,** in which it was held that a member of a Limited Liability Partnership was a 'limb (b)' worker. Lady Hale said (para 24):

> *"First, the natural and ordinary meaning of 'employed by' is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.*
>
> *Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in Hashwani v Jivraj [2011] UKSC 40, [2011] IRLR 827 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else. The general medical practitioner in Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005; [2012] IRLR 834, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a 'worker' within the meaning of s.230(3)(b) of the 1996 Act …"*

27. In reaching this conclusion Lady Hale cited two further decisions of the EAT, in **Cotswold Developments Construction Ltd v Williams [2006] IRLR 181** Langstaff J said, (para. 53):

> *"… a focus on whether the purported worker actively markets his services as an independent person to the world in general (a person who will thus have a client or customer) on the one hand, or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations, will in most cases demonstrate on which side of the line a given person falls."*

28. In **James v Redcats (Brands) Ltd [2007] ICR 1006**; a case involving a self employed deliverer of parcels; Elias J agreed that this would *"often assist in providing the answer'* and provided the following analogy:

> *"in a general sense the degree of dependence is in large part what one is seeking to identify - if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached …"*

Other factors

29. If those irreducible minimum requirements are met, the other considerations include the degree of control which the employer exercises over the individual, how the parties have labelled or characterised their relationship, the treatment of tax and national insurance, and any other matters that form part of the working relationship; all of which are relevant but not, in themselves, conclusive.

Holiday pay

30. Regulations 13 and 13A of The Working Time Regulations 1998 provide the entitlement of a worker to four weeks' annual leave and 1.6 weeks' additional leave respectively. There is no right to carry over leave from one holiday year to another unless agreed.

31. In **King v Sash Windows Workshop and anor 2018 ICR 693 ECJ**, the European Court of Justice, considered a case where a salesman who had been wrongly classified as a self-employed contactor wished to claim back pay for unpaid annual leave going back many years. He had been able to take leave but only on the basis that it was unpaid and so chose not to take his full entitlement. The ECJ held that Article 7 the Working Time Directive required a worker to be able to carry over and accumulate paid annual leave rights until the termination of his employment where those rights have not been exercised over several consecutive reference periods because the employer refused to provide holiday pay. As this right derived from the Directive and not domestic legislation; it only applies to the 4 weeks' annual entitlement under Regulation 13.

32. In **Robinson-Steele v RD Retail Services Ltd and two other cases 2006 ICR 932, ECJ**, the European Court of Justice considered whether 'rolled-up' holiday pay arrangements were consistent with the regulations and decided that they were

not as *'Article 7 of the Directive precludes the payment for minimum annual leave from being made in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, rather than in the form of a payment in respect of a specific period during which the worker actually takes leave.*' The ECJ went on to state that Article 7 did not preclude employers setting off genuine holiday payments paid under the rolled-up method against a worker's entitlement to payment when he or she actually takes leave. However, such sums had to have been paid '*transparently and comprehensibly, as holiday pay'*. The burden is on the employer to prove such transparency and comprehensibility.

36. The EAT examined the guidance from domestic case law. This was set out by the EAT in **Marshalls Clay Products Ltd v Caulfield and ors and other cases 2004 ICR 436, EAT,** and refined by another division of the EAT in the subsequent case of **Smith v AJ Morrisroes and Sons Ltd and other cases 2005 ICR 596, EAT**. In Smith, the EAT stated that, for an employer to be given credit for rolled-up holiday payments, *'there must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked'*. This would be best evidenced, the EAT said, by; the provision for rolled-up holiday pay being clearly incorporated into the contract of employment; the amount allocated to holiday pay being identified in the contract and preferably also in the payslip, and records being kept of holidays taken and reasonably practicable steps being taken to ensure that workers take their holidays.

Conclusions

Mutuality of Obligation

37. The minimum requirement for a contract for services is the existence of mutuality of obligation. Mr Liddle undertook work for the respondent regularly and consistently for four years. Save for one occasion in 2016 when he took on work for another company for three weeks, he worked exclusively for the respondent. In the four years that he worked for the respondent he refused a job once because of the state of the premises.

38. Looking at the reality of the situation I find that mutuality existed.

Control/Subordination

39. Mr Liddle falls into that second category identified by Lady Hale in **Bates**. He was recruited by the respondent to work as a decorator as an integral part of the decorating business. He was not offering his services to a range of customers, he was working exclusively for the respondent and was not in business on his own account.

40. The respondent exercised control over Mr Liddle's work: the location, the task, the remuneration he would receive, and the timescale that the work had to be carried out to.

41. Whilst Mr Liddle provided his own brushes and tools all the necessary equipment for the job (paint, wallpaper, glue, ladders, etc) was provided by the respondent or main contractor. This does not suggest that he was in business on his own account.

Substitution

42. There was no evidence to suggest that Mr Liddle had the right to substitute his labour and I find that he did not have that right.

CIS Membership

43. This scheme is available to all subcontractors working in the construction industry. It provides an incentive to join as otherwise deductions for tax are high and must be claimed back. Mr Liddle's participation in this scheme is not an indicator that he was genuinely self-employed in these circumstances.

44. Accordingly, I find that Mr Liddle was a worker as defined by section 230(3)(b) Employment Rights Act 1996 and therefore entitled to holiday pay.

Did the respondent pay holiday pay?

45. The respondent relies entirely on the written contract as entitling it to 'roll up' holiday pay entitlement. As I have found, that written agreement was not entered by the parties. As Mrs Ogden accepted, rolled up entitlement was not referred to or specified anywhere else and so the requirements of *'transparency and comprehension'* have not been met. There was no lawful agreement between the parties to pay holiday pay, rolled up as a proportion of hourly rate of pay, and so the respondent did not comply with its duty to allow Mr Liddle to take paid holiday in accordance with the provisions of regulation 13 and 13A of the Working Time Regulations 1998.

46. As Mrs Ogden confirmed, the holiday year was April to the end of March, there was no evidence of any agreement to allow holiday to be carried over to the next holiday year. I accepted Mr Liddle's evidence that he took two weeks off work to go on holiday in the summers of 2016, 2017 and 2018 only, and that the two weeks' non-payment in January 2019 arose because the respondent had no work for him to do. I do not accept that Mr Liddle used that time to work elsewhere or took it as holiday; there was no evidence at all to support that.

47. Mr Liddle stated that he did not take more than two weeks' unpaid holiday a year in addition to not working on statutory holidays, because he could not afford to as he was not paid, and on his return from holiday he would have to work a week in hand. This plainly discouraged him from exercising his statutory right to take paid leave. Applying **Sash Windows**, I allowed his claim to extend throughout the period of his work with the respondent from 13 March 2015 to 19 January 2019.

48. Mr Liddle was not allowed paid annual leave throughout his employment and this amounted to a breach of regulation 13 of the Working Time Regulations, and a continuing series of unlawful deductions from wages under section 23 of the

Employment Rights Act 1996. from Wages Limitation Regulations 2014 limits a backdated claim to two years from the date of issue of proceedings, which in this case would limit it to 1 June 2017. However, applying **Sash Windows** to the circumstances of this case, a limit of 2 years would prevent the Directive having its proper effect and Mr Liddle from obtaining appropriate remedy and compensation; and so to enable the Directive to have full effect, I allow Mr Liddle's claim for four weeks' holiday pay per holiday year to continue beyond the two year limit and extend to13 March 2015.

49. The parties agreed that the claimant's pay in the relevant period was £560.35 per week gross. The calculations were as follows:

13th March to 31st March 2015 @ 4 weeks pro rata	£86.20
1st April 2015 to 31st March 2016 @ 4 weeks	£2,241.40
1st April 2016 to 31st March 2017 @ 4 weeks	£2,241.40
1st April 2017 to 1st June 2017 @ 4 weeks pro rata	£344.83
2nd June 2017 to 31st March 2018 @ 5.6 weeks pro rata	£2,594.85
1st April 2018 to 20th January 2019 @ 5.6 weeks pro rata	£2,521.58
Total	**£10,030.26**

50. The respondent is ordered to pay Mr Liddle the sum of £10,030.26.

Employment Judge Howard

Date: 11th November 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 November 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2405949/2019**

Name of case: **Mr G Liddle** v **Jay Decorators Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 26 November 2019

"the calculation day" is: 27 November 2019

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at **www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426**

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.